PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 174

NEIL MERLE SMITH, PETITIONER

vs.

JOHN E. BENNETT, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF IOWA

FILED FEBRUARY 23, 1960
CERTIORARI GRANTED JUNE 27, 1960

Supreme Court of the United States

OCTOBER TERM, 1960

No. 174

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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[fol. 1] EXHIBIT 1

IN THE DISTRICT COURT OF LEE COUNTY, STATE OF IOWA, FORT MADISON

To: The November Term, A.D. 1959

NEIL MERLE SMITH, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

To: the Honorable J. R. Leary, Judge, Lee County District Court, Fort Madison, Iowa.

Your Petitioner, Neil Merle Smith, of the Iowa State Penitentiary, respectfully represents and shows unto your Honor, that he is now imprisoned and restrained of his liberty, by the Warden, John E. Bennett, at the State Penitentiary, Fort Madison, Iowa.

Your Petitioner further represents that the cause or pretense of the said imprisonment and restraint according to his best knowledge and belief is, "ONLY", a warrant of arrest, as issued out of the offices of the Iowa Boared of Parole, and under the provisions of Iowa Criminal Statutes No. 247-28. Said warrant is absent of this petition, for the reason the petitioner has not had service [fol. 2] OF SAME.

Your Petitioner further brings to the attention of this Court, THE FACT, THERE IS NO MITTIMUS, in this case, as issued out of a Court of Law, For the alleged violation of Iowa Statutes 247-28, 1958 Code of Iowa. And for which the petitioner is presently confined.

Your petitioner further represents that he is not committed or detained by virtue of process of any Court or Judge of the United States. Or is he confined, committed or detained by virtue of process of any Court or Judge of the State of Iowa.

Your petitioner further represents and shows unto your Honor, that the legality of the imprisonment has not already been adjudged upon in a prior proceeding of the same character. And your petitioner further represents, that no petition for Writ of Habeas Corpus has heretofore been made to any Court in the United States District Court, or in the State of Iowa District Court.

Your petitioner further represents and shows unto your Honor that the said imprisonment and restraint, as he is informed and verily believes is illegal and contrary to Law. Wherein it is in direct violation of the petitioners, Iowa, and United States Constitutional rights. And is so shown As:

(1) Contrary to the provisions of Iowa's Constitution, ARTICLE 1, Sec. 9. The right to trial by Jury shall remain inviolate: • • •, But no person shall be deprived of life, Liberty or Property, without due process of law. ARTICLE 1. Sec. 10. • • •, and in cases involving the life, or Liberty of an individual the accused shall have a right to a speedy [fol. 3] and public trial by an impartial jury.

(2) Contrary to the provisions of the United States Constitution. AMENDMENT 6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the State and District wherein the crime shall have been committed, • • •, nor shall any state deprive any person of Life, Liberty, or property without due process of law, nor deny to any person within its Jurisdiction the Equal Protection of the Law.

Your Petitioner contends and shows unto your Honor, his above rights have been violated in the following manner:

(a) The Iowa Board of Parole, on or about July 21st 1959, did issue a Warrant of arrest for the petitioner, as provided under the provisions of Iowa Criminal Codes. And as provided by the Attorney General opinion 192 at page 316.

(b) On or about July 21st 1959, one Mr. Wilson, Parole agent of the Iowa Board of Parole, did, without Jurisdiction, or Court order, remove the petitioner from the County Jail of Johnson County, Iowa. And did transfer

the petitioner to the State Penitentiary, at Fort Madison, Iowa, without due process of law.

(c) On or about July 21st 1959, the Warden of the Iowa State Penitentiary, John E. Bennett, did accept jurisdiction of the petitioner, from the agent of the Iowa Board of Parole, Mr. Wilson, without order of a Court of Jurisdiction, and in violation of the 14th Amendment of the U. S. Constitution, and its Due Process Clause.

(d) July 25th 1959, 96 Hrs after arrest by warrant, the Warden, and/or the arresting Parole agent of the Iowa [fol. 4] Board of Parole, has made no attempt to return the petitioner, to Johnson County, Iowa, (The County and Court of Jurisdiction, in this case now at bar) and its Court, for arraignment, pleading trial in a Court of Law, and/or trial by Jury. On the alleged violation of law, the cause for this imprisonment.

(e) On this 6th day of November 1959, and after 108 days of confinement, on ONLY, a warrant of arrest. The Warden, John E. Bennett, has arbitrarily, capriciously denied the petitioner the right to be heard in a Court of Law, or the right to trial by Jury. And he, "The Warden", has continued to hold, confine and imprison the petitioner, without conviction. Continued to punish the petitioner to the partial provisions of the criminal codes of Iowa. And continued to punish the petitioner to the provisions of Prison Rule, 71 as though the petitioner had been convicted in a Court of Law.

Your petitioner shows unto your Honor, that allegations, b, c, d and e herein set out are in direct violation of the United States Constitution, under the 5th, 6th and 14th Amendment. And therefore are in direct violation of the Petitioners Constitutional rights.

IT IS THEREFORE, your petitioner respectfully Prays, that a Writ of Habeas Corpus may issue, to the respondent, John E. Bennett, Warden, of the Iowa State Penitentiary, at Fort Madison, Iowa. And returnable forthwith, in order that your Honor may inquire into the cause or pretense of the said committment, imprisonment and restraint. As provided by Law, and discharge your peti-

[fol. 5] tioner out of custody of the Warden, John E. Bennett.

Respectfully Submitted

/s/ Neil Merle Smith
NEIL MERLE SMITH, Petitioner
pro se
Box 316,
Fort Madison, Iowa.

STATE OF IOWA)
COUNTY OF LEE) ss:

I, /s/ Neil Merle Smith, being first duly sworn on oath deposes and says that I am the Petitioner in the foregoing petition for Writ of Habeas Corpus, and the statements and averments above made are true to the best of my knowledge and belief.

/s/ Neil Merle Smith
NEIL MERLE SMITH

Subscribed and sworn to before me, RALPH D. MOEHN, a Notary Public in and for Lee County, State of Iowa, this 9th day of November, 1959, by Neil Merle Smith, who is personally known to me to be the petitioner herein.

/s/ Ralph D. Moehn,
RALPH D. MOEHN,
Notary Public, Lee County,
State of Iowa.

MY COMMISSION EXPIRES
JULY 4th 1960.

NOTARY SEAL

[fol. 6] EXHIBIT 2

IN THE DISTRICT COURT OF LEE COUNTY,
STATE OF IOWA, FORT MADISON

NEIL MERLE SMITH, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,
RESPONDENT

MOTION TO ALLOW PETITION FOR WRIT OF HABEAS CORPUS
"IN FORMA PAUPERIS"

Comes now the petitioner, above named, and in his own person moves this Court, to allow and file the attached petition for writ of habeas corpus, in the Lee County District Court, Fort Madison, Iowa. And allow said petition to be filed, in Forma Pauperis, on and by the authority of the affidavit of poverty attached hereto and made part of this motion.

Respectfully Motioned

/s/ Neil Merle Smith
NEIL MERLE SMITH, Petitioner
Box 316,
Fort Madison, Iowa.

[fol. 7] EXHIBIT 3

IN THE DISTRICT COURT OF LEE COUNTY, STATE OF IOWA, FORT MADISON

AFFIDAVIT OF POVERTY

COUNTY OF LEE)
STATE OF IOWA) ss:

I, Neil Merle Smith, having been first duly sworn according to Law, do claim that I am with out funds or property, and without sufficient funds to pay the filing fee, and perfect this matter of petition for Writ of Habeas Corpus, now before this Court, IT IS THEREFORE, the petitioner prays the Lee County District Court, and the Honorable J. R. Leary, Judge, to allow and file the said attached petition without the required filing fee.

/s/ Neil Merle Smith
NEIL SMITH, Petitioner.

Subscribed and sworn to before me this 9th day of November, 1959, at Fort Madison, Iowa.

/s/ Ralph D. Moehn,
RALPH D. MOEHN, Notary Public in and for Lee County, State of Iowa, Fort Madison.

MY COMMISSION EXPIRES
JULY 4th 1960.

NOTARY SEAL

[fol. 8] EXHIBIT 4

IN THE DISTRICT COURT OF LEE COUNTY,
STATE OF IOWA, FORT MADISON

Marriage-Probate-District Court-Birth-Death-Criminal
Records Since 1837

CLERK OF THE DISTRICT COURT
Lee County, Iowa

November 14, 1959

Lyle B. Miller, Clerk
Keokuk
Phone 29

Mary McMurry, Deputy
Fort Madison
Phone DRake 2-3523

Neil Merle Smith
#24871
Box 316
Fort Madison, Iowa.

Dear Sir:

I am reutrning your "Motion to allow petition for Writ of Habeas Corpus Informapauperis".

If you will mail this office $4.00 to cover filing fee for the above, it will be presented to Honorable W. L. Huiskamp.

Very truly yours

/s/ Mary McMurry
MARY MCMURRY
Deputy Clerk District Court

Enc.

• • • •

EXHIBIT 5

[fol. 9] (File Endorsement Omitted)

IN THE SUPREME COURT OF THE STATE OF IOWA

NEIL MERLE SMITH, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, APPELLEE

MOTION FOR LEAVE TO APPEAL "IN FORMA PAUPERIS"— Filed November 24, 1959

Comes now the Appellant, above named, and moves this Court to permit the Appeal in the above entitled cause, to be prosecuted to the Iowa Supreme Court, from the order November 14, 1959, of the Clerk of the Lee County District Court, "Mrs. Mary McMurry", denying to file the Appellants Motion to the Lee County District Court.

The Appellant further moves this Court, to permit the Appellant to prefect this Appeal to the Provisions of Iowa Rules of Civil Procedure, 342, (a) (b) (c) (d), R. C. P. 343 343 344 345 346, and all other provisions required by the Iowa Supreme Court, IN FORMA PAUPERIS, On and by the authority of the Affidavit of Poverty attached hereto and made part of this Motion.

(s) Neil Merle Smith,
Pro se.
Box 316
Fort Madison, Iowa.

[fol. 10] EXHIBIT 6

IN THE SUPREME COURT OF THE STATE OF IOWA

COUNTY OF LEE)
STATE OF IOWA) ss.

Herein I, Neil M. Smith, do hereby state upon oath and deposes the following:

I am a Citizen of the United States, and of legal age, and otherwise qualified to make this affidavit.

I am without funds to pay costs of having records, brief and arguments printed in appelate procedure to the Supreme Court of Iowa, and am further unable to pay costs or fees, in connection with filing and prosecuting an Appeal to the Supreme Court of Iowa to seek the redress to which I believe I am entitled by proceeding in Habeas Corpus. I am without property or possessions, personal or otherwise, or means to obtain funds for payment of costs of this action, nor am I able to give security thereof.

This affidavit is made in good faith for the purpose of securing the redress to which I believe I am entitled in Habeas Corpus proceeding, and which, because of poverty, I am unable to prepay or give security for said costs. All, statements contained herein are true and correct to the best of my knowledge and belief.

(s) Neil Merle Smith, Appellant

Subscribed and sworn to before me this 20th day of November, 1959.

(s) Ralph D. Moehn,
Notary Public Lee County,
State of Iowa.

My commission expires
July 4th, 1960 (SEAL)

[fol. 11] EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF IOWA

BE IT REMEMBERED, That on the 15th day of December, 1959, the following proceedings were had, to-wit:

Appeal from Lee District Court

ORDER

NEIL MERLE SMITH, APPELLANT

VS.

JOHN E. BENNETT, Warden, Iowa State Penitentiary

* * * *

Motion for leave to appeal from order of Clerk of Lee County District Court Denied, by the court.

THE SUPREME COURT OF IOWA

(s) R. A. Oliver, Judge.

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 16th day of December, A.D. 1959.

/s/ Helen M. Lyman, Clerk.
By Deputy.

[fol. 12] CLERK'S CERTIFICATE

I hereby certify that the foregoing is a full, true and complete copy of the "MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS" and ORDER of court filed December 16th, 1959 denying the Motion for leave to appeal, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, Iowa, this 9th day of August, A. D., 1960.

/s/ Helen M. Lyman, Clerk.

(SEAL)

[fol. 13] IN THE SUPREME COURT
OF THE UNITED STATES

No. 174, October 1960 Term

SMITH, PETITIONER

v.

BENNETT, WARDEN

STIPULATION—July 26, 1960

It is hereby stipulated by and between Norman A. Erbe, Attorney General of the State of Iowa, counsel for the respondent, John E. Bennett, Warden, and Luther L. Hill, Jr., attorney for the petitioner, Neil Merle Smith, that the record in the above entitled action shall consist of the following documents, copies of which are attached hereto:

Exhibit 1. Petition for writ of habeas corpus in the District Court of Lee County, Iowa, entitled, Neil Merle Smith, Petitioner, v. John E. Bennett, Warden.

Exhibit 2. Motion in Lee County, Iowa, District Court to allow petition for writ of habeas corpus in forma pauperis.

Exhibit 3. Affidavit of poverty dated November 9, 1959, filed in Lee County, Iowa, District Court.

Exhibit 4. Letter from Mary McMurry, Deputy Clerk of the District Court in and for Lee County, Iowa, dated November 14, 1959, addressed to Neil Merle Smith.

Exhibit 5. Motion for leave to appeal in forma pauperis filed in the Supreme Court of Iowa on November 24, 1959.

Exhibit 6. Affidavit in support of said motion filed in Supreme Court of Iowa on November 24, 1959.

Exhibit 7. Order of the Supreme Court of the State of Iowa dated December 15, 1959.

• • • •

[fol. 14] [init] N.A.E. by M.R.N.
L. L. Hill, Jr. by R.A.C.

Dated at Des Moines, Iowa, this 26th day of July, 1960.

/s/ Norman A. Erbe
NORMAN A. ERBE, Attorney General of the State of Iowa, Attorney for the Respondent, John E. Bennett

/s/ Luther L. Hill, Jr.
LUTHER L. HILL, Jr., Attorney for Petitioner, Neil M. Smith

[fol. 15]

Marriage-Probate-District Court
Birth-Death-Criminal
Records Since 1837

CLERK OF THE DISTRICT COURT
Lee County, Iowa

August 11, 1960

Lyle B. Miller, Clerk
Keokuk
Phone 29

Mary McMurry, Deputy
Fort Madison
Phone DRake 2-3523

Mr. Ralph A. Church
c/o Henry & Henry, Lawyers
Equitable Building
Des Moines 9, Iowa

Inre: Smith vs. Bennett, Warden

Dear Mr. Church:

I have before me your letter of August 9th, 1960, stating that you are a partner of Mr. Luther L. Hill, Jr. who was appointed attorney for Neil Merle Smith in his Petition against John E. Bennett, Warden of the Iowa State Penitentiary by the Supreme Court of the United States; that Mr. Hill is on his vacation; that, in his absence, you have received a letter from the Clerk of the United States Supreme Court, returning the stipulation entered into by Mr. Hill and the Iowa Attorney General relating to the record; that the United States Supreme Court Clerk requests that various documents attached to the stipulation be certified by the Clerk of this Court and the Clerk of the Supreme Court of Iowa as true copies.

The only papers that I have in my office relating to this matter are not of record and are a copy of my letter of November 27, 1959, addressed to Mr. Marion R. Neely, Assistant Attorney General; the letter of Mr. Smith, addressed to me, dated November 19, 1959 containing documents Mr. Smith identified as a Notice of Appeal from the Order of the Clerk of this Court (of course, there is no such Order); a letter from Mr. Smith to this office, dated November 16, 1959; a copy of my letter to Mr.

Smith dated November 20, 1959; the original of Mr. Smith's letter to this office, dated November 5, 1959; a copy of my letter to Mr. Smith dated November 14, 1959; a copy of the letter of the County Attorney of Lee County to Mr. Marion R. Neely, Assistant Attorney General, dated December 23, 1959. Since none of these papers are of record, it is impossible for me to certify to any of them.

I find it impossible to certify to your enclosed copies of Petition for writ of habeas corpus, Motion to Allow Petition for writ of habeas corpus, affidavit of poverty and a copy of my letter to Mr. Smith, dated November 14, 1959 because none of these matters are of record in my office. When a filing fee is not paid for the filing of a Petition other than in a criminal case, I am not permitted under the law to file the same and, therefore, there is no record kept in the matter. I am sending a copy of this letter to Mr. Marion R. Neely, Assistant Attorney General, for his information and if he has any suggestions or directions to this office, we will be glad to receive them. This letter is being written under the advice of the County Attorney of Lee County, Iowa.

Very truly yours,

/s/ Mary McMurry
Deputy Clerk of the District Court

cc: Mr. Marion R. Neely

[fol. 16] SUPREME COURT OF THE UNITED STATES

No. 785 Misc., October Term, 1959

NEIL MERLE SMITH, APPELLANT

vs.

JOHN E. BENNETT, WARDEN

APPEAL from the Supreme Court of the State of Iowa.

ORDER DISMISSING APPEAL AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 27, 1960

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss,

ON CONSIDERATION WHEREOF, It is ordered by this Court that the motion to dismiss the appeal herein be, and it is hereby, granted.

IT IS FURTHER ORDERED that the appeal herein be, and it is hereby, dismissed.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted limited to the question decided in Burns v. Ohio, 360 U.S. 252. The case is transferred to the appellate docket as No. 1034 and consolidated for hearing with Nos. 446 Misc. and 515 Misc. A total of two hours is allowed for the argument of these cases.

June 27, 1960

[fol. 17] SUPREME COURT OF THE UNITED STATES

No. 785 Misc., October Term, 1959

NEIL MERLE SMITH, APPELLANT

vs.

JOHN E. BENNETT, WARDEN

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 27, 1960

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 27, 1960

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 584979 311

PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 177

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF IOWA

PETITION FOR CERTIORARI FILED OCTOBER 31, 1959
CERTIORARI GRANTED JUNE 27, 1960

Supreme Court of the United States

OCTOBER TERM, 1960

No. 177

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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[fol. 1] EXHIBIT 1

IN THE DISTRICT COURT OF LEE COUNTY, FIRST JUDICIAL DISTRICT, STATE OF IOWA, FORT MADISON

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS TO THE PRESIDING JUDGE

Comes now Richard W. Marshall, Petitioner in the above entitled cause and respectfully states to this Honorable Court, He is illegally restrained of his liberty under Color of the United States Constitution, contrary to the provisions of the 14th Amendment, § 1, thereof, express or implied therein.

Petitioner's illegal restraint being enforced and insured by John E. Bennett, Warden, Iowa State Penitentiary, Lee County, Fort Madison, Iowa.

The cause of said illegal restraint is by virtue of a mittimus issued to said Warden out of the District Court of Lee County Iowa, August 28, 1958, a copy of which is attached hereto.

The detention and restraint of the Petitioner is illegal wherein the County Attorney's Information is fatal on its face, and does not confer jurisdiction upon the Court to render any judgment, whereas it does not charge Petitioner with "intent" and the plea thereon was obtained by coercion and duress.

[fol. 2] The legality of the illegal detention and restraint of the Petitioner has never been adjudged upon in a prior proceeding of the same or similar character. Application for the writ of habeas corpus has never before been made to or refused by any Court or Judge relative to the judgment herein complained of.

WHEREFORE, PETITIONER PRAYS:

This Honorable Court issue the writ of habeas corpus herein prayed for, requiring the Respondent to appear with the person of Richard W. Marshall, forthwith, and to serve and file his answer to this Petition at or before such time. That at such time, the Court proceed to hear and determine the legality of such restraint, and upon a determination that Richard W. Marshall is illegally and unlawfully restrained, Order his release, and discharge the Petitioner from the custody of the Respondent Warden hereon, forthwith, without costs to the Petitioner.

Respectfully Submitted

/s/ Richard W. Marshall
RICHARD W. MARSHALL
Petitioner

Subscribed and Sworn to this 16 Day Of September 1959, at Fort Madison, Lee County Iowa.

/s/ Ralph D. Moehn
Notary Public in and for
Lee County Iowa.

My Commission expires July 4, 1960.

SEAL

[fol. 3] EXHIBIT 2

IN THE DISTRICT COURT OF LEE COUNTY, FIRST JUDICIAL DISTRICT, STATE OF IOWA, FORT MADISON

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, RESPONDENT

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Richard W. Marshall, Petitioner, as movant hereon, and makes application to the Honorable Court for leave to proceed in the habeas corpus proceedings herein, without pre-payment of the statutory costs or filing fee.

Petitioner's supporting affidavit is attached hereto.

Respectfully Submitted

/s/ Richard W. Marshall
RICHARD W. MARSHALL
Box 316, #25719
Fort Madison, Iowa.

[fol. 4] EXHIBIT 3

STATE OF IOWA)
COUNTY OF LEE) ss.

IN THE DISTRICT COURT OF LEE COUNTY,
FIRST JUDICIAL DISTRICT, STATE OF IOWA,
FORT MADISON

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,
Fort Madison, Iowa, RESPONDENT

PETITIONER'S AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Richard W. Marshall, Petitioner in the above entitled cause being first duly sworn on Oath, deposes and states the following, to wit:

I am a citizen of the United States, and a resident of the State of California, now serving a term of 10 years in the Iowa State Penitentiary, Fort Madison, Lee County Iowa.

I am of legal age, and of sound mind, without funds or property of my own, nor money, nor means to obtain money with which to pay the statutory fileing fee to prosecute the habeas corpus proceeding, and unless the application is granted I will be unable to obtain the relief to which I believe I am entitled by the writ of habeas corpus.

I have this day mailed by United States Mail, postage prepaid, a copy of this application signed in manuscript by myself, to the Hon. Norman A. Erbe, Attorney-General of Iowa, and Attorney of Record for the Respondent hereon, at the State House, Des Moines, Iowa.

I have read the within and enclosed petition prescribed by me, and the same is ~~true, and I~~ so do verily believe.

/s/ Richard W. Marshall
RICHARD W. MARSHALL
Petitioner, pro se

Subscribed and Sworn to this 16 Day Of September 1959, at Fort Madison, Iowa.

/s/ Ralph D. Moehn
Notary Public in and for
Lee County Iowa.

My Commission expires July 4, 1960.

SEAL

[fol. 5] EXHIBIT 4

IN THE DISTRICT COURT OF LEE COUNTY, FIRST JUDICIAL DISTRICT, STATE OF IOWA, FORT MADISON

September Term, 1959

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, RESPONDENT

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS—September 18, 1959

The petitioner has filed an application to be permitted to proceed in his habeas corpus proceedings without the payment of the statutory filing fee on the grounds that he is a pauper. Habeas corpus is a civil proceeding and there is no provision in the law for permitting of filing petitions for Writ of Habeas Corpus without the same filing fee as in other civil cases. The letter transmitting this petition also states that he is directing it to the Court under Section 663.11 of the 1958 Code of Iowa. This is also an attempt on the part of the petitioner, in the opinion of the Court, to have the petition heard without the necessity of paying the statutory filing fee. Section 663.11 is not applicable to this petition. This section refers to evidence which the Court may obtain from judicial proceedings before it. There is no judicial proceedings before the Court which would authorize or justify the Court in issuing a writ on its own motion.

The Court has, however, examined the plaintiff's petition and is of the opinion that even though filing fee is [fol. 6] paid and the petition properly filed that the petitioner would not be granted the relief which he seeks.

Plaintiff's contention is based on the failure to include the word "intent" in the County Attorney's Information and the allegation that his plea was obtained by coercion

and duress. The Information conforms to Section 773.34, and there is no facts alleged to sustain the allegations of coercion and duress, and since the petition on its face shows the petitioner would not be entitled to any relief the petition would have to be denied if properly presented to the Court.

Dated this 18th day of September, 1959.

/s/ J. R. Leary
Judge of District Court
First Judicial District

• • • •

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 7] EXHIBIT 5

IN THE DISTRICT COURT OF LEE COUNTY, FIRST JUDICIAL DISTRICT, STATE OF IOWA, FORT MADISON

RICHARD W. MARSHALL, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, APPELLEE

NOTICE OF APPEAL

To: Helen M. Lyman, Clerk, Supreme Court of Iowa, Des Moines, Iowa.

Comes now Richard W. Marshall, Appellant hereon and hereby files timely Notice of Appeal, pursuant to the provisions of the Rules of Civil Procedure # 336, 1958 Code of Iowa, from the judgment entered of Record in the Lee County Iowa District Court, the 19th Day of September, 1959, in the entitled matter of petition for writ of habeas corpus, Richard W. Marshall, Petitioner vs John E. Bennett, Warden, Iowa State Penitentiary, Lee County, Fort Madison, Iowa, Respondent Warden thereon, and the adverse Order appended thereto.

Respectfully Submitted

/s/ Richard W. Marshall
RICHARD W. MARSHALL.
Appellant

[fol. 8] EXHIBIT 6

IN THE DISTRICT COURT OF LEE COUNTY, FIRST JUDICIAL DISTRICT, STATE OF IOWA, FORT MADISON.

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, RESPONDENT

MOTION TO SETTLE RECORD ON APPEAL

Comes now Richard W. Marshall, Petitioner-Appellant, hereon, and respectfully moves the Court settle the proposed abstract in the above entitled cause, as the Record on Appeal, appending thereto an Order of the Court that the proposed abstract correctly shows the evidence of the trial, pursuant to the provisions of R.C.P. 340 (c), 1958 Code of Iowa, and return said abstract to the Petitioner-Appellant within the time prescribed by law.

Respectfully Submitted

/s/ Richard W. Marshall
RICHARD W. MARSHALL
Petitioner-Appellant
Box 316, #25719
Fort Madison, Iowa

[fol. 9] EXHIBIT 7

IN THE DISTRICT COURT OF LEE COUNTY, FIRST JUDICIAL DISTRICT, STATE OF IOWA, FORT MADISON

September Term, 1959

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, RESPONDENT

ORDER—October 6, 1959

The petitioner has filed a motion to settle the record on appeal in the above matter, attaching to said motion, copy of the order entered by this Court on the 18th day of September, 1959, and also a copy of the application for leave to proceed in form pauperis and petitioner's affidavit in support of the application and also a copy of the petition for Writ of Habeas Corpus. There is no record to settle on this appeal. The appeal can only be from the order denying the petitioner's request to file his petition for Writ of Habeas Corpus as a pauper; so that the only papers necessary to be presented on this appeal would be the application to permit the petitioner to file without the payment of the statutory filing fee since the petition for Writ of Habeas Corpus was never formally considered by the Court.

Dated this 6th day of October, 1959.

/s/ J. R. Leary
Judge of District Court
First Judicial District

• • • •

[fol. 10] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 11] EXHIBIT 8

IN THE SUPREME COURT OF THE STATE OF IOWA

RICHARD W. MARSHALL, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, APPELLEE

MOTION TO PROCEED ON TYPEWRITTEN COPIES—
Filed September 29, 1959

Comes now Richard W. Marshall, Appellant hereon, and respectfully moves the Court issue an Order sustaining Appellant's motion for leave to proceed with the appellate litigation in the above entitled cause with the minimum number of copys of the Record on Appeal, in typewritten form, and the number to be designated by the Court.

Respectfully submitted

Richard W. Marshall
Appellant
Box 316, #25719
Fort Madison, Iowa

I hereby certify that the foregoing is a full, true and complete copy of the Motion filed in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 8th day of August, A.D. 1960.

/s/ Helen M. Lyman, Clerk.

[fol. 12] EXHIBIT 9

IN THE SUPREME COURT OF THE STATE OF IOWA

BE IT REMEMBERED, That on the 30th day of September, 1960, the following proceedings were had, to-wit:

Appeal from Lee District Court.

RICHARD W. MARSHALL, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, APPELLEE

ORDER

Application granted and applicant may file 15 copies of the Record in typewritten form as per request.

THE SUPREME COURT OF IOWA

(s) Robert L. Larson,
Chief Justice

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 30th day of September, A.D. 1960.

/s/ Helen M. Lyman, Clerk.
By Deputy

[fol. 13] EXHIBIT 10

IN THE SUPREME COURT OF THE STATE OF IOWA

RICHARD W. MARSHALL, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, APPELLEE

MOTION TO BE ALLOWED TO PROCEED IN FORMA PAUPERIS, ETC.—Filed October 20, 1959

To: ROBERT L. LARSON, CHIEF JUSTICE, SUPREME COURT OF IOWA.

Comes now Richard W. Marshall, Appellant hereon, and hereby respectfully moves the Honorable Court issue an Order sustaining Appellant's motion for leave to proceed with the appellate litigation without the prepayment of any statutory costs or filing fees; in "forma pauperis", wherein this Honorable Court has sustained the Appellant's motion to proceed with 15 typewritten copies of the Record on appeal, as the same appears of record, September 30, 1959, on the appeal taken from the adverse order of the Lee District Court, entered of record, September 19, 1959, on the habeas corpus proceeding attempted therein.

Appellant's Certified affidavit of poverty is hereto attached.

Respectfully submitted

Richard W. Marshall
Appellant, Pro se
Box 316, #25719
Fort Madison, Iowa

I hereby certify that the foregoing is a full, true and complete copy of the Motion filed in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 8th day of August, A.D. 1960.

/s/ Helen M. Lyman, Clerk.

[fol. 14] EXHIBIT 11

STATE OF IOWA :
COUNTY OF LEE :

IN THE SUPREME COURT OF THE STATE OF IOWA

RICHARD W. MARSHALL, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, APPELLEE

AFFIDAVIT OF POVERTY

Comes now Richard W. Marshall, Appellant in the above entitled cause, being first duly sworn on oath, deposes and relates the following, to wit:

—1—

I am a Citizen of the United States, and a legal resident of the State of California; now serving a term of 10 years in the Iowa State Penitentiary, Lee County, Fort Madison, Iowa.

—2—

I am of legal age and majority rights, of sound mind, without funds or property of my own; nor money, nor means to obtain money with which to pay the statutory filing fee for docketing this appeal, and, unless this attached motion is sustained I will be unable to obtain the rellief to which I believe I am entitled by this appeal from the adverse order of the Lee District Court, on the habeas corpus proceedings attempted therein, September 19, 1959.

—3—

I have this day mailed by United States Mail, postage prepaid, a copy of the within and attached motion, signed in manuscript by myself, addressed to the Hon. Norman

A. Erbe, Attorney-General of Iowa, and the Attorney of Record for the Appellee, at his office in the State House, Des Moines, Iowa.

—4—

I have read the within and foregoing prescribed by me, and the same is true, and I so do verily believe.

(s) Richard W. Marshall
Appellant Pro se.

Subscribe and Sworn to this 6th day of October, 1959, at Fort Madison, Lee County, Iowa.

(s) Ralph D. Moehn
Notary Public in and
for Lee County, Iowa

My Commission expires
July 4, 1960 (SEAL)

[fol. 15] I hereby certify that the foregoing is a full, true and complete copy of the Affidavit of Forma Pauperis filed on October 20, 1959, in the above cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 8th day of August, A.D. 1960.

/s/ Helen M. Lyman, Clerk.

(SEAL)

[fol. 16] EXHIBIT 12

IN THE SUPREME COURT OF THE STATE OF IOWA

BE IT REMEMBERED, That on the 20th day of October, 1959, the following proceedings were had, to-wit:

Appeal from Court.

RICHARD W. MARSHALL, APPELLANT

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, APPELLEE

ORDER

Application denied.

THE SUPREME COURT OF IOWA

Robert L. Larson
Chief Justice

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 8th day of August, A. D. 1960.

/s/ Helen M. Lyman, Clerk.
By _____ Deputy

[fol. 17] IN THE SUPREME COURT
OF THE UNITED STATES

No. 177, October 1960 Term

MARSHALL, PETITIONER

v.

BENNETT, WARDEN

STIPULATION—July 26, 1960

It is hereby stipulated and agreed between Norman A. Erbe, Attorney General of the State of Iowa, counsel for the respondent, John E. Bennett, Warden, and Luther L. Hill, Jr., counsel for the petitioner, Richard W. Marshall, that the record in the above action shall consist of the following documents, copies of which are attached hereto:

Exhibit 1. Petition for writ of habeas corpus in Lee County District Court.

Exhibit 2. Application for leave to proceed in forma pauperis in the Lee County, Iowa, District Court.

Exhibit 3. Affidavit of poverty in support of the motion.

Exhibit 4. Order denying leave to proceed in forma pauperis, signed by Judge J. R. Leary, September 19, 1959.

Exhibit 5. Notice of appeal, filed September 25, 1959.

Exhibit 6. Motion to settle record, filed September 29, 1959.

Exhibit 7. Order by Judge J. R. Leary, dated October 6, 1959.

Exhibit 8. Motion in the Supreme Court of Iowa to be allowed to file typewritten copies of the record on appeal.

Exhibit 9. Order of the Supreme Court of Iowa dated September 30, 1959, granting application and directing that applicant may file 15 copies of the record in typewritten form as per request.

[fol. 18] Exhibit 10. Motion filed in the Supreme Court of Iowa to be allowed to proceed in forma pauperis without payment of the statutory costs and filing fees.

Exhibit 11. Affidavit in support thereof dated October 6, 1959.

Exhibit 12. Order of the Supreme Court of Iowa dated October 20, 1959, denying the application to proceed in forma pauperis.

[init] N.A.E. by M.R.Y.
L.L.H.,Jr. by P.A.C.

Dated at Des Moines, Iowa, this 26th day of July, 1960.

/s/ Norman A. Erbe
NORMAN A. ERBE, Attorney General of the State of Iowa, Attorney for Respondent, John E. Bennett

/s/ Luther L. Hill, Jr.
LUTHER L. HILL, JR., Attorney for Petitioner, Richard W. Marshall.

[fol. 19] Marriage-Probate-District Court
Birth-Death-Criminal
Records Since 1837

CLERK OF THE DISTRICT COURT
Lee County, Iowa
August 11, 1960

Lyle B. Miller, Clerk
Keokuk
Phone 29

Mary McMurry, Deputy
Fort Madison
Phone DRake 2-3523

Mr. Ralph A. Church
c/o Henry & Henry, Lawyers
Equitable Building
Des Moines 9, Iowa

Inre: Marshall vs. Bennett, Warden

Dear Mr. Church:

I have your letter of August 9, 1960 relating to the above matter in which you state that your partner, Mr. Luther L. Hill, Jr. was appointed attorney for Richard W. Marshall by the Supreme Court of the United States; that Mr. Hill is on his vacation; that, on his behalf, you have received a letter from the Clerk of the United States Supreme Court, returning a stipulation entered into by Mr. Hill and by the Iowa Attorney General to the record and request that various documents attached to the stipulation be certified by the Clerk of our District Court and the Clerk of the Supreme Court of Iowa as true copies. Your letter enclosed the various documents, asking that I certify them establishing true and exact copies and return them to you.

Under the law, when a Petitioner files a Petition for a writ of habeas corpus and the District Court denies the Application and no writ is issued, then the Application for the writ is returned to the Petitioner with the reasons for the denial of the writ endorsed thereon. In this instance, that was done. Therefore, there is no District Court file in my office relating to the Petition of Richard W. Marshall vs. John C. Bennett, Warden, for writ of habeas corpus. The same situation applies to Mr.

Marshall's Application to proceed "in forma pauperis" and to his affidavit of poverty in support of the Application. I do have a copy of the Court's Order, filed September 19th, 1959 Petitioner's Application to proceed in forma pauperis, signed by Judge Leary and therefore, I have certified to the copy of that Order and return it to you herewith. The same reasoning applies to the Notice of Appeal. However, I do have that Notice of Appeal in a miscellaneous file, since I have no file relating to the Petition for writ of habeas corpus. The Notice of Appeal is not entered of record in my office in any record since, as I understand it under the law, there is no record for such Notice. However, I do have in my office, not recorded, the Notice of Appeal, filed September 25, 1959. However, I do not feel that under the Iowa law, I would have the right to certify to a copy of that Notice as being a matter of record and, therefore, I am not certifying to that copy of the Notice of Appeal. I do have of record, the Order of Judge Leary, dated October 6, 1959, finding that there is no record to settle on this appeal; that the Appeal can only be from the Order denying the petitioner's request to file his Petition for writ of habeas corpus as a pauper, dated October 6, 1959 and therefore, I am certifying to the copy of that Order and enclose it herewith.

[fol. 20] I recognize that this situation presents considerable difficulty to you in presenting the entire facts situation to the United States Supreme Court, but I also recognize my legal limitations and certifying to matters not properly of record in my office.

I am sending a copy of this letter to Mr. Marion R Neely, Assistant Attorney General, so that if he has any further suggestions or directions to this office, he may submit them. This letter is being written on the advice of the County Attorney of Lee County, Iowa.

Very truly yours,

LYLE B. MILLER
CLERK OF THE DISTRICT COURT
By: /s/ Mary McMurry
Deputy

Enc.
MM:jl

[fol. 21] SUPREME COURT OF THE UNITED STATES

No. 446 Misc., October Term, 1959

RICHARD W. MARSHALL, PETITIONER

vs.

JOHN E. BENNETT, WARDEN

On petition for writ of Certiorari to the Supreme Court of the State of Iowa.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 27, 1960

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the question decided in Burns v. Ohio, 360 U.S. 252. The case is transferred to the appellate docket as No. 1037 and consolidated with Nos. 515 Misc. and 785 Misc. A total of two hours is allowed for the argument of these three cases.

June 27, 1960

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 564978 312

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 174

NEAL MERLE SMITH,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

No. 177

RICHARD W. MARSHALL,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR PETITIONERS

LUTHER L. HILL, JR.
Equitable Building
Des Moines, Iowa
Counsel for Petitioners

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 174

NEAL MERLE SMITH,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

No. 177

RICHARD W. MARSHALL,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the District Court of Lee County, Iowa, in *Marshall* v. *Bennett* (No. 177), has not been officially reported and is found at MR 6.* No opinion of the Lee

County, Iowa, District Court was delivered in *Smith* v. *Bennett* (No. 174). In *Smith*, the deputy clerk of the District Court of Lee County, Iowa, wrote a letter refusing to file the petition for a writ of habeas corpus (SR 7). The orders of the Supreme Court of Iowa were likewise not published in the official reports, but are found at MR 17 and SR 10.

Concise Statement of Grounds on Which Jurisdiction of Court Invoked

The jurisdiction of this court is invoked under 28 United States Code, Sections 1257, 2103 and 2101(c). The dates of the orders sought to be reviewed are: No. 174, *Smith* v. *Bennett*—December 15, 1959; No. 177, *Marshall* v. *Bennet*, October 20, 1959. A petition for certiorari was filed in *Marshall* v. *Bennett*, No. 177, on October 31, 1959. Smith filed an appeal in this court on February 23, 1960.

Constitutional Provisions and Statutes Involved

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Article I, Sec. 9, Constitution of the United States: "The privilege of the writ of habeas corpus shall not be sus-

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• The Record in *Marshall* v. *Bennett*, No. 177, is hereafter referred to as "MR" and the Record in *Smith* v. *Bennett*, No. 174, is hereafter referred to as "SR."

pended unless in cases of rebellion or invasion the public safety may require it."

Article I, Sec. 13, Constitution of the State of Iowa: "The writ of habeas corpus shall not be suspended or refused when application is made as required by law, unless in case of rebellion, or invasion the public safety may require it."

Section 606.15, 1958 Code of Iowa: "The Clerk of the District Court shall charge and collect the following fees . . . 1. For filing any petition, appeal . . . and docketing the same, $4.00 . . . "

Section 685.3, 1958 Code of Iowa: "The Clerk [of the Supreme Court] shall collect the following fees . . . Upon filing each appeal, $3.00."

Questions Presented for Review

The orders granting certiorari limited the question presented for review to the application of the rule announced by the Court in *Burns* v. *Ohio*, 360 U. S. 252, to the facts of these two cases. Questions presented for review may, therefore, be stated as follows:

May a state constitutionally deny access to its courts to a pauper in habeas corpus proceedings by refusing to allow a petition for a writ of habeas corpus to be filed unless and until a filing fee is paid?

May a state constitutionally deny access to its appellate courts to a pauper attempting to appeal in habeas corpus proceedings by refusing to consider an appeal unless and until a filing fee is paid?

Statement of the Cases

The cases presented by petitioners Smith and Marshall are basically similar. For purposes of clarity, the cases are stated separately below.

A. *Smith* v. *Bennett*, No. 174

Petitioner was sentenced to a term of ten years in the State Penitentiary at Fort Madison, Iowa, for breaking and entering. In due course he was paroled to his home in Iowa City, Iowa. After he had been on parole for a short time, he was advised by the parole-board that he had violated his parole. He states that on July 15, 1959, he was arrested by the Iowa City, Iowa, police and was confined in the Iowa City jail for four hours, thereafter being transferred to the Johnson County jail, in Iowa City, Iowa, where he was held for six days. While in the Johnson County jail he was not permitted to call his home, attorney, or place of employment, nor was he taken before a court of law. On the sixth day of his confinement in the Johnson County jail he was removed to the State Penitentiary at Fort Madison, Iowa. When he was returned to the penitentiary he was informed that he had "lost" 120 days on account of his parole violation.

He attempted to file a petition for a writ of habeas corpus in the District Court in and for Lee County, Iowa, in which he raised constitutional questions about the method in which he had been picked up in connection with his alleged parole violation (SR 1), accompanying his petition for a writ of habeas corpus with a motion to proceed *in forma pauperis* (SR 5), and an affidavit of poverty (SR 6). On November 14, 1959, the deputy clerk of the Lee County, Iowa, District Court wrote to petitioner Smith telling him that:

"If you will mail this office $4 to cover filing fee for the above, it will be presented to the Honorable W. L. Huiskamp" (SR 7).

Petitioner Smith then filed a motion in the Iowa Supreme Court for leave to appeal *in forma pauperis* (SR 8). He supported his motion with an affidavit of poverty (SR 9). The Supreme Court of Iowa denied petitioner's motion (SR 10).

Petitioner Smith filed an appeal in this Court, and on June 27, 1960, the Court dismissed the appeal, but treated the papers as a petition for certiorari and granted certiorari, limited, however, to the question decided in *Burns* v. *Ohio*, 360 U. S. 252 (SR 16). The Court also granted petitioner's motion for leave to proceed *in forma pauperis* (SR 17).

B. *Marshall* v. *Bennett*, No. 177

Richard W. Marshall was charged by the County Attorney of Lee County, Iowa, with the crime of breaking and entering. Marshall, who was represented by counsel, entered a plea of guilty on August 28, 1958. He was sentenced on the same day to ten years imprisonment at the Iowa State Penitentiary at Fort Madison, Iowa.

In September, 1959, petitioner attempted to file a petition for a Writ of Habeas Corpus in the Lee County, Iowa, District Court. He alleged that he was "illegally restrained of his liberty under Color of the United States Constitution, contrary to the provisions of the 14th Amendment, Section 1, thereof, express or implied therein" (MR 1). The detention was illegal, he claimed, because the County Attorney's information was "fatal on its face" and the "plea thereon was obtained by coercion and duress" (MR 1). Petitioner also filed an application for leave to pro-

ceed *in forma pauperis* (MR 4) and an affidavit in support of the application (MR 4).

On September 19, 1959, the District Court denied petitioner the right to file his petition for habeas corpus without payment of the filing fee (MR 6).

Petitioner attempted to appeal to the Supreme Court of Iowa and filed a motion to settle the record on appeal (MR 9). In response to this motion the Lee County, Iowa, District Court issued an order stating that there was no record to settle on appeal because nothing had ever been filed in the District Court; the petition for a writ of habeas corpus was "never formally considered by the Court" (MR 10).

In the Supreme Court of Iowa the petitioner moved for leave to proceed *in forma pauperis* (MR 13) and supported his motion by an affidavit (MR 15). The application was denied (MR 17).

A petition for certiorari and a motion for leave to proceed *in forma pauperis* were filed in this Court. On June 27, 1960, the Court granted the motion for leave to proceed *in forma pauperis* and granted certiorari, limited, however, to the question decided in *Burns* v. *Ohio*, 360 U. S. 252 (MR 22).

Summary of Argument

In Iowa, there is no *in forma pauperis* procedure applicable to habeas corpus proceedings. Hence, indigent prisoners are kept from the courts. But *Burns* v. *Ohio*, 360 U. S. 252, and *Griffin* v. *Illinois*, 351 U. S. 12, teach that the states may not under the 14th Amendment to the United States Constitution deny appellate review in *criminal* proceedings to the poor merely because of their poverty. While

it is true that habeas corpus is a civil proceeding, it is a highly regarded remedy protecting, as it does, the liberty of the individual. *Bowen* v. *Johnston*, 306 U. S. 19. Indeed, the right to habeas corpus is imbedded, not only in the Constitution of the United States, and the Constitution of the State of Iowa, but also in the Constitutions of at least 46 other states of the Union. Habeas corpus occupies, therefore, a highly privileged place in American law.

Habeas corpus relief should not be denied to prisoners merely because of their poverty. The court need not extend the rule of *Burns* v. *Ohio, supra,* to all civil proceedings, but can draw the line at those civil proceedings involving the liberty of the individual. This has been done in Oregon. *Barber* v. *Gladden*, 298 P. 2d 986 (Ore. 1956).

We submit further that the states are required to furnish some form of post conviction review for criminal defendants. Cf. *Mooney* v. *Holohan*, 294 U. S. 103. Iowa—because of the filing fee requirement—provides no post conviction review for indigent prisoners; the 14th Amendment to the United States Constitution requires her to open her courts to such indigent prisoners.

We therefore urge the Court to hold that Sections 606.15 and 685.3, 1958 Code of Iowa, are unconstitutional under the equal protection and due process clauses of the 14th Amendment in so far as those statutes require filing fees from indigent persons in habeas corpus proceedings.

ARGUMENT

A. A Petition for a Writ of Habeas Corpus Cannot Be Filed in Iowa Nor Can an Appeal Be Taken in Habeas Corpus Proceedings Unless Filing Fees Are First Paid.

Iowa statutes provide that "the Clerk of the District Court *shall* charge and collect" (emphasis supplied) a fee of $4 for filing any petition, and docketing the same, Sec. 606.15, 1958 Code of Iowa, and that the Clerk of the Supreme Court "*shall* collect" (emphasis supplied) $3 upon filing each appeal. Sec. 685.3, 1958 Code of Iowa.

Although the Iowa Code provides that transcripts shall be furnished at the expense of the County where the criminal defendant has perfected an appeal and has convinced the judge that he cannot pay for the transcript, Sec. 793.8, 1958 Code of Iowa, there are no other provisions in the Iowa Code or the rules of the Iowa court allowing an appeal, or the filing of a petition for a writ of habeas corpus without payment of a filing fee.

The state conceded in its Further Response to the petition for certiorari in *Henry Hooper* v. *John E. Bennett*, No. 178, October Term, 1960, petition dismissed as improvidently granted on October 10, 1960 that " . . . in Iowa, indigents are precluded from filing habeas corpus petitions, unless they pay a filing fee."

It is clear, therefore, that these petitioners, who in their petitions for a writ of habeas corpus raise constitutional questions with respect to their continued detention (the merits of which are not before this Court), have been denied the right to have their petitions for habeas corpus considered by the Iowa courts. They have been denied this right because "indigents are precluded from filing habeas corpus petitions, unless they pay a filing fee."

Any other person in Iowa, any like prisoner in the State Penitentiary at Fort Madison, may file a petition for a writ of habeas corpus, and, if he pays the necessary filing fee, his petition will be filed and considered by the Court. Article 1; Sec. 13. Constitution of the State of Iowa; Chap. 663, 1958 Code of Iowa. Any other person in Iowa, any like prisoner in the State Penitentiary at Fort Madison, may file an appeal from a denial of a writ of habeas corpus, and, if he pays the filing fees, his appeal will be considered by the Supreme Court of Iowa.

The only reason these petitions were not considered by the Iowa courts was the failure to pay the necessary filing fees. It is true that the fees are small. For a person without any means at all—and the State has not challenged the affidavits of poverty filed in these cases—it matters little whether the required fee is $4 or $400: both amounts are beyond the means of the petitioners here.

B. Iowa May Not Constitutionally Deny an Indigent Petitioner for a Writ of Habeas Corpus the Use of Its Courts by Requiring Him to Pay a Filing Fee.

1. *Burns* v. *Ohio.*

The question presented in *Burns* v. *Ohio,* 360 U. S. 252, was whether a state may constitutionally require an indigent defendant in a *criminal* case to pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts.

In the *Burns* case the petitioner was convicted in Ohio in 1953; the conviction was affirmed by the Ohio Court of Appeals in the same year. He filed a notice of appeal in the Court of Appeals at once, but did nothing further until 1957, when he sought to file a copy of the earlier notice of appeal and a motion for leave to appeal in the Supreme

Court of Ohio. He attached to the papers which he sought to file in the Supreme Court of Ohio an affidavit of poverty in which he stated that he was "without sufficient funds with which to pay the costs for Docket and Filing Fees in this cause of action." 360 U. S. at 253-254. He also attached a motion for leave to proceed *in forma pauperis*.

The Clerk of the Supreme Court of Ohio refused to file the papers and returned them with the following letter:

> "We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the Rules of Practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of the docket fee. For that reason we cannot honor your request.
>
> "We are returning the above mentioned papers to you herewith." 360 U. S. at 254.

This Court granted certiorari, 358 U. S. 919, and held that the State of Ohio could not constitutionally impose financial barriers on the right of indigent criminal defendants to appeal. Said the Court at 360 U. S. 257-258:

> "There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio . . . Here, the action of the State has completely barred the petitioners from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law . . . "

Mr. Justice Frankfurter and Mr. Justice Harlan dissented on the ground that the letter from the Clerk of the Ohio Supreme Court was not a final judgment within the meaning of 28 U. S. C., Section 1257.

Putting to one side the question of final judgment, it is obvious that the facts in *Burns* v. *Ohio, supra,* and in the cases at bar are quite similar. In *Burns* the criminal defendant was denied a right to appeal to the Supreme Court of Ohio because of his inability to pay filing fees; in the cases at bar, the petitioners, convicted of crimes and incarcerated in the state penitentiary, are denied the right to file petitions for habeas corpus because of their inability to pay filing fees; they are also denied the right to proceed in the Supreme Court of Iowa without payment of the filing fees.

2. *Griffin* v. *Illinois*

In *Griffin* v. *Illinois*, 351 U. S. 12, the petitioner was convicted of armed robbery in Illinois. He filed a motion requesting that a certified copy of the entire record, including a stenographic transcript of the proceedings be furnished him without cost. He alleged that he was a poor person, "with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal . . . " 351 U. S. 13. The Illinois courts denied his motion, thus refusing to furnish him with a transcript at public expense. The Supreme Court of the United States held that the defendant must be furnished with a transcript, or an adequate substitute. Mr. Justice Black in an opinion joined in by three members of the Court stated:

> "Providing equal justice for poor, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the

> royal concessions of Magna Carta: 'to no one will we sell, to no one will we refuse, or delay, right or justice . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him or send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition our own constitutional guarantees of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system, all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court' . . . 351 U. S. at 16-17.

In the same case, at 351 U. S. page 19, Mr. Justice Black said:

> "Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Mr. Justice Frankfurter joined in the disposition of the *Griffin* case, and in an opinion concurring in the judgment stated at 351 U. S. page 23:

"But when a state deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

"To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a later-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' (John Cournos, in Modern Plutarch, p. 27.)"

And Mr. Justice Frankfurter continued:

"The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." 351 U. S. at p. 24.

The *Griffin* case, again, is very like the cases at bar. To secure an appellate review, the criminal defendant needed a transcript of the record. He could not pay for the transcript, and, therefore, but for the holding of this Court, he would have been denied an appellate review. The difference between the *Griffin* case and the cases at bar is that the *Griffin* case involved the right of a criminal defendant to a criminal appeal, whereas the cases at bar involve the

right of prisoners to file petitions for habeas corpus in the State courts.

3. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*

The decision announced by this Court in *Griffin* was followed in *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214, where the court said that a State "denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials". 357 U. S. at p. 216. And see *People* v. *Pride*, 3 N. Y. 2d 545, 147 N. E. 2d 719 (N. Y. Ct. of Appeals, 1958).

So here, these petitioners are denied a constitutional right if they cannot file a petition for a writ of habeas corpus merely because they are without funds to pay a filing fee. Great issues of personal freedom should not turn on possession of money; are the more fortunate economically to enjoy the privilege of the great freedom writ, while the less fortunate remain in jail?

C. The Rule of Burns v. Ohio, 360 U.S., 252, Should Be Extended to Habeas Corpus Proceedings.

1. The Nature of Habeas Corpus Proceedings.

Habeas corpus proceedings have geenrally been termed "civil" proceedings. During the course of its opinion, *In the Matter of Tom Tong*, 108 U. S. 556, 559, this Court stated:

> "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for the punish-

> ment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. . . . "

Accord: *Riddle* v. *Dyche*, 262 U. S. 333, 335-336.

One court, at least has taken the position that habeas corpus proceedings are criminal in nature, at least where relief is sought by a party charged with a crime. *Gleason* v. *Commissioners*, 30 Kansas 53, 1 Pac. 384. In that case the Kansas Supreme Court stated:

> "And it is also true that in many cases it is a purely civil remedy, as where it is sought in behalf of parents to obtain the custody of children, or for the relief of imprisoned debtors; but we think it is also a criminal proceeding, when sought as in this case for the relief of a party charged with crime."

If this Court were now to adopt the Kansas view, and characterize habeas corpus proceedings as criminal, at least where a prisoner seeks his freedom, there would be no distinction between these cases and *Burns* v. *Ohio*, 360 U. S. 252. Formal labels assigned to actions do not necessarily reveal their true nature. Habeas corpus is the post conviction method in Iowa (and in most of the States) for testing the constitutionality of a criminal's incarceration; and as the Kansas court said in *Gleason* v. *Commissioners, supra*, it is a criminal proceeding when sought for the relief of a party charged with crime. Habeas corpus is, we submit, a part of the criminal procedure in the United States.

2. Habeas Corpus is more than a mere civil action.

Even if habeas corpus is not a criminal proceeding, we submit that in Anglo-American law it is more than a mere civil proceeding.

Burton J. Hendrick in his book, *Bulwark of the Republic* (Little, Brown & Co. 1937), sets forth what is probably the popular view of habeas corpus at page 344:

> "These two latin words, habeas corpus—'you may have the body'—enshrined one of the greatest privileges of that Magna Carta which the barons wrung from a reluctant king at Runnymede. Until the fall of the bastille French monarchs enjoyed the pleasant prerogative of seizing any person who had incurred their displeasure, and, without making any charges or holding trial, throwing him into prison. There the sufferer would remain until he rotted, for there was no way by which his release could be obtained. Present-day reports from Germany, Italy and Russia [1937] indicate that this is still a common practice in those countries. But such high-handed measures are impossible where the writ of habeas corpus exists. In these countries friends of the imprisoned man at any time 'may have the body.' The officers of justice can be compelled to produce a prisoner in court, give the reasons for his incarceration, and present the evidence on which the accusation rests. Thus, so long as the writ of habeas corpus prevails, imprisonment on false or unsupported charges is impossible. And this safeguard of liberty is deeply imbedded in the Constitution of the United States. Nothing suggestive of French lettres de cachet or Hitlerian arrests and executions is possible under the American system."

The writ of habeas corpus can be traced back to an early age in English law. But, according to Plunkett, *A Concise History of the Common Law* (The Lawyers Co-operative Publishing Co., 2nd Edition 1936), p. 57:

> " . . . [I]t was in the Seventeenth Century that *habeas corpus* fought its greatest battle. The Crown had endeavored to establish the right of imprisoning without trial upon a warrant signed by the Secretary of State and a few Privy Counselors, alleging 'reasons of state'. Against so serious a claim of state absolutism habeas corpus became in the words of Seldon 'the highest remedy in law for any man that is imprisoned.' Throughout the Stuart period habeas corpus was steadily used and improved by the courts of common law. But procedural difficulties stood in the way . . . Many of these defects were remedied in an Habeas Corpus Act of 1679. . . . "

The passage of the Habeas Corpus Act of 1679 was described by Macaulay as follows:

> "The day of that prorogation, the 26th of May, 1679, is a great era in our history. For on that day the Habeas Corpus Act received the royal assent. From the time of the Great Charter the substance of the law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right, but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied. The King would gladly have refused his consent to that measure: but he was about to appeal from his Parliament to his people on the question of the succession, and he could not venture at so critical a moment to reject a bill which was in the

highest degree popular." 1 Macaulay, History of England (Quartes & Coates, Philadelphia), p. 230.

The importance of the writ is illustrated by the fact that it was guaranteed by Article I, Sec. 9 of the Constitution of the United States. See also *The Federalist*, No. LXXXV (Hamilton) 472-473 (The Colonial Press 1901). And not only is the right to the writ guaranteed in Article I, Sec. 13 of the Constitution of the State of Iowa, but also in the Constitutions of the following States:

Art. I, Sec. 17, Constitution of Alabama, Art. I, Sec. 13, Constitution of Alaska; Art. 2, Sec. 14, Constitution of Arizona; Art. 2, Sec. 11, Constitution of Arkansas; Art. 1, Sec. 5, Constitution of California; Art. II, Sec. 21, Constitution of Colorado; Art. 1, Sec. 14, Constitution of Connecticut; Art. 1, Sec. 13, Constitution of Delaware; Sec. 7, Florida Declaration of Rights, Constitution of Florida (The writ of habeas corpus shall be grantable . . . freely and without cost . . .); Art. 1, Sec. 1, Constitution of Georgia; Art. 1, Sec. 5, Constitution of Idaho; Art. 2, Sec. 7, Constitution of Illinois; Art. 1, Sec. 27, Constitution of Indiana; Sec. 8, Bill of Rights, Constitution of Kansas; Sec. 16, Bill of Rights, Constitution of Kentucky; Art. 1, Sec. 10, Constitution of Maine; Art. VI, Sec. 98, Constitution of Massachusetts ("The privilege and benefit of the writ of habeas corpus shall be enjoined in this commonwealth in the most free, easy, cheap, expeditious and ample manner . . . "); Art. II, Sec. 11, Constitution of Michigan; Art. 1, Sec. 7, Constitution of Minnesota; Art. 3, Sec. 22, Constitution of Mississippi; Art. 1, Sec. 12, Constitution of Missouri; Art. III, Sec. 21, Constitution of Montana; Art. 1, Sec. 3, Constitution of Nebraska; Art. 1, Sec. 5, Constitution of Nevada; Pt. 2, Art. 91, Constitution of New Hampshire; Art. 1, Sec. 14, Constitution of New Jersey; Art. II, Sec. 7, Con-

stitution of New Mexico; Art. 1, Sec. 4, Constitution of New York; Art. 1, Sec. 21, Constitution of North Carolina; Sec. 5, Constitution of North Dakota; Art. 1, Sec. 8, Constitution of Ohio; Art. 2, Sec. 10, Constitution of Oklahoma; Art. 1, Sec. 23, Constitution of Oregon; Art. 1, Sec. 14, Constitution of Pennsylvania; Art. 1, Sec. 9, Constitution of Rhode Is.; Art. 1, Sec. 23, Constitution of So. Car.; Art. VI, Sec. 8, Constitution of So. Dak.; Art. 1, Sec. 15, Constitution of Tenn.; Art. 1, Sec. 12, Constitution of Texas; Art. 1, Sec. 5, Constitution of Utah; Ch. II, Sec. 33, Constitution of Vermont; Sec. 58, Constitution of Virginia; Art. 1, Sec. 13, Constitution of Washington; Art. III, Sec. 4, Constitution of West Virginia; Art. 1, Sec. 8, Constitution of Wisconsin; Art. 1, Sec. 17, Constitution of Wyoming.

Thus, the right to the writ of habeas corpus has been imbedded in the fundamental laws of at least 47 of the States. Such constitutional recognition illustrates the high preferred position granted to the writ in American law.

This Court stated in *Bowen v. Johnston*, 306 U. S. 19, 26, that:

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired . . . ".

And see 28 U. S. C. Sec. 1914(a); 28 U. S. C. Sec. 1915.

Habeas corpus is the procedural safeguard of personal liberty; it is the "freedom writ". It is the means, the device, by which a person wrongly detained can secure his liberty. Hendrick, *op. cit. supra*, did not, we submit, overstate the case when he wrote that:

> "Nothing suggestive of the French lettres de cachet . . . . is possible under the American System . . . "

because of habeas corpus.

But is habeas corpus relief to be limited to those who can pay filing fees? To hold that habeas corpus petitions cannot be filed without payment of filing fees means that a basic remedy, guaranteed in both federal and state constitutions, is available to the rich, but not the poor. Such a holding we submit is squarely contrary to the teaching of *Burns* v. *Ohio, supra,* and *Griffin* v. *Illinois, supra.*

3. State and Federal Court Decisions Extending *Griffin* v. *Illinois* to Habeas Corpus Proceedings

The reasoning of *Griffin* v. *Illinois, supra,* has been extended by one state court to state habeas corpus proceedings. *Barber* v. *Gladden,* 298 P. 2d 986 (Ore. 1956). In the *Barber* case, Barber sought a writ of habeas corpus against the warden of the Oregon State Penitentiary. Barber presented a motion for an order authorizing the judge of the circuit court to direct the county treasurer to post an undertaking on appeal and pay all fees and costs on appeal, or in the alternative to order the requirement waived. Grounds for the motion were that Barber was an indigent person wholly without funds, personal or otherwise, to pay such fees or costs or to post an undertaking required to prosecute said appeal. The motion was accompanied by an affidavit of poverty. The court held that to enforce the provisions of the Oregon statutes requiring an appeal bond, as applied to the case of an indigent appellant, was unconstitutional "by the necessary implications of the decision of the United States Supreme Court" (298 P. 2d at 990), and that the "enforcement in this case of the requirement for an appeal bond would violate the Equal Protection Clause of the 14th Amendment and therefore that the statute is to that extent and in this application, unconstitutional". 298 P. 2d at 990. In reaching this decision, the court stated:

"If a pauper who appeals to a state Supreme Court from alleged ordinary non-constitutional errors of law is entitled, under the Equal Protection Clause, to such assistance as will make possible the fair presentation of his case, then surely the United States Supreme Court would hold that a pauper who claims that he is imprisoned under a void judgment would be entitled under the same clause to the waiver of the requirement of a bond for costs if such waiver is necessary to the presentation of his appeal."

And the Oregon Supreme Court continued:

"It may be that a distinction will be suggested between the two cases, because *Griffin* v. *Illinois* was a criminal appeal whereas Barber's appeal is in a civil action for habeas corpus. But the argument cuts the wrong way. To be sure habeas corpus is in form a civil proceeding, but it is one based upon the provisions of the Oregon constitution. Its function, as applied to persons in prison for crime, is to afford relief from confinement under a void judgment, a wrong which transcends in seriousness mere errors of law at a trial." 298 P. 2d at 990."

The same question was considered by the Federal District Court for Oregon in the case of *Daugharty* v. *Gladden*, 150 F. Supp. 887 (D. C. Oregon 1957). A petition for a writ of habeas corpus was filed in the Federal District Court. The petitioner had been sentenced to 15 years in an Oregon court for issuing a forged check; he claimed in the habeas corpus proceedings that his constitutional rights were violated in his original trial. On December 9, 1954, he had filed a petition for habeas corpus in the State Court for Marion County; on July 11, 1956, the petition was denied; on August 17, 1956, he filed a petition for leave to

appeal with the Supreme Court of Oregon without paying the $20 statutory filing fees, or posting statutory undertakings; this petition was allowed by the Supreme Court of Oregon on August 20, 1956. On September 26, 1956, petitioner filed a motion for a praecipe on appeal seeking to have the Clerk in the Marion County habeas corpus proceedings pay for the record. On October 3, 1956, the Oregon Supreme Court denied plaintiff's motion. On November 21, 1956, the Attorney General of the State moved to dismiss petitioner's appeal; on November 25, 1956, the petitioner filed a petition for certiorari in the Supreme Court of the United States; on December 28, 1956, the Supreme Court of Oregon dismissed the appeal; on February 25, 1957, the Supreme Court of the United States denied petitioner's petition for certiorari. 352 U. S. 1009. The District Court, on these facts, held that the remedies of the petitioner were not exhausted since the statute of Oregon allowed a review by the Supreme Court of Oregon by original writ of habeas corpus *in forma pauperis*. In the course of his opinion, the District Judge said:

> "This court is of the opinion that . . . the statutes of Oregon requiring the payment of fees to the County Clerk . . . in order to obtain a transcript required by the statutes of Oregon relative to appeals to the Supreme Court are unconstitutional and violative of the constitutional rights of petitioner under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States. In particular the petitioner was denied an appellate review of the Circuit Court order dismissing his writ of habeas corpus for the reason that he was without funds to pay for the same. . . . Appellate review of a judicial determination cannot be on one hand allowed the rich, and on the other, denied the poor." 150 F. Supp. at 891-892.

In *Daugharty* v. *Gladden*, 257 Fed. 2d 750 (Ninth Circ. 1958), the Court of Appeals for the Ninth Circuit reversed the District Court on the ground that the petitioner had exhausted his State remedies. In the course of the opinion, the Circuit Court decided the question: Did the dismissal of the state appeal because of petitioner's financial inability to furnish an appellate transcript deprive him of the equal protection of the laws under the 14th Amendment? The court held that such denial did deprive him of the equal protection of the laws. At 257 Fed. 2d p. 759, the court said:

> "Here the question involves the supplying of a required transcript on appeal in a habeas corpus proceeding, in which it is claimed that there were violations of constitutional rights under the Oregon constitution which rendered the judgment of conviction void.
>
> The Oregon Supreme Court has held that the Griffin rule applies regardless of such a distinction in the nature of the proceedings. In Barber v. Gladden, 210 Oregon 46, 298; P. 2d 986, 990; 309 P. 2d 192, it was held, applying the rule of Griffin, that a statute which requires an applicant for a writ of habeas corpus to file an undertaking on appeal, in order to obtain an appellate review, is unconstitutional as applied to an indigent person, thus requiring waiver of the statutory requirement . . . "

And again at 257 Fed. 2d p. 760:

> "We agree with this view where, as in this case, inability to furnish a required bond or transcript is all that stands in the way of an otherwise appropriate and properly perfected appeal. The indigency of an appellant in such a proceeding ought not to deprive him of a right to appeal which the state purports to accord all of its citizens."

The subsequent history of *Daugharty* v. *Gladden* will be found at 179 Fed. Supp. 151.

In *Commonwealth* v. *Banmiller*, 160 A. 2d 126 (Superior Ct. Pa. 1960), the Court held that habeas corpus was a civil action and that, therefore, the state could constitutionally require a $12.00 filing fee. In reaching this decision the Court relied heavily on the denial of a writ of certiorari by this Court. Said the Superior Court: " . . . it appears to us that the Supreme Court of the United States would not have refused the Burge petition for certiorari to the Supreme Court of Pennsylvania (No. 463, Misc., Oct. 1960 Term, 4 L. ed. 2d 549) on its order dealing only with the payment of a filing fee had it intended so recent a decision as Burns v. State of Ohio, supra, to apply to the civil action here involved." 160 A. 2d at 127. It is unnecessary to cite authority for the proposition that denial of certiorari is not a holding on the merits by this Court.

Thus two appellate courts, one state, the other federal, have held that *Griffin* v. *Illinois* requires the states to grant indigent prisoners free access to the courts in habeas corpus proceedings. We submit that a like decision in this case necessarily follows from *Burns* v. *Ohio;* that, to paraphrase the Superior Court of Oregon, surely this Court will not sanction state procedures which bar indigents from using state courts in habeas corpus proceedings, especially where, as here, the prisoners allege that they are imprisoned under processes and procedures void because unconstitutional. All these petitioners ask is that someone, sometime, somewhere read their petitions and rule on the merits of their claims.

4. *The holding of Burns v. Ohio need not be extended to all civil actions.*

It may be argued that the extension of the doctrine of *Burns v. Ohio* to habeas corpus proceedings necessarily means that the doctrine will be extended to all civil actions. For the reasons already set forth, we submit that habeas corpus is no ordinary civil action; the Court can certainly draw a line at habeas corpus proceedings.

Indeed, such a line has already been suggested by former Chief Justice Stanley E. Qua, of Massachusetts. Justice Qua wrote:

> "How about civil cases. Here again, as Mr. Justice Harlan points out, logic would seem to place no limits upon the *Griffin* rule. It would seem to be equally applicable to plaintiffs and defendants. However, the concern of the Supreme Court in recent years has been with personal liberty. Civil cases seldom involve personal liberty. A clear line of distinction is available, even if not logical . . . I agree with the Supreme Court of Oregon, which said through Mr. Justice Brand in *Barber* v. *Gladden*, 'We think the Supreme Court will not carry its ruling to such coldly logical extremes as would disrupt the accepted judicial procedures of 48 states.' That was a habeas corpus proceeding and therefore a civil case, but the personal liberty of a prisoner was involved, and the court held the Griffin case applicable as in criminal cases. The implication seems to be that it would not be applicable generally." Stanley E. Qua, *Griffin* v. *Illinois*, 25 University of Chicago Law Review 143, 149-150.

See also the remarks of Hon. Frederick G. Hamley, United States Circuit Judge before the Judicial Conference of the 9th Circuit, 24 F. R. D. 75, 80-81.

5. The federal constitution guarantees a post conviction review of a claimed violation of constitutional rights.

It is submitted that state courts are required by the federal constitution to afford some corrective judicial process by which a claimed violation of constitutional rights can be tested in the state courts. In *Mooney* v. *Holohan*, 294 U. S. 103, this Court stated that it was not at liberty to assume that a state denied its court jurisdiction to redress a prohibited wrong. And in *Young* v. *Reagan*, 337 U. S. 235, the Court had before it a problem involving Illinois procedure for the "vindication of federal rights", 337 U. S. at 238, after conviction. The prisoner had attempted to obtain a writ of habeas corpus. The writ was denied without a hearing for the reason that it was "insufficient in law and substance". 337 U. S. at 237. The Attorney General of Illinois explained the denial of the petition for the writ as based upon state procedural grounds: that habeas corpus was not an appropriate remedy for the relief of denials of due process. This Court, speaking through Chief Justice Vinson, stated:

> "Of course we do not review decisions which rest upon adequate non-federal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights . . . But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of federal right. And that is the effect of the denials of habeas corpus in a number of cases now before this Court . . . Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this court has required the scrupulous adherence of all federal courts, see Ex parte Hawk, 321

U. S. 114, and cases cited, presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adopting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met. If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case." 337 U. S. at 238-239.

The Special Committee on Habeas Corpus, Report to the Conference of Chief Justices, App. at 12 (Council of State Governments, 1953) quoted from a memorandum of the Department of Justice of California as follows:

> "If any proposition can be stated dogmatically in this field it is this: State courts must provide post-conviction corrective process which is at least as broad as the requirements which will be enforced by the federal courts in habeas corpus through the due process clause of the 14th Amendment. A state can call this remedy whatever it wants, but it must provide some corrective process. Cf. Mooney v. Holohan, 294 U. S. 103."

See also Shaefer, *Federalism and State Criminal Procedure*, 70 Harvard Law Review, 1, 16.

If a state must provide a post-conviction method by which denial of constitutional rights are tested, then surely the state cannot deny such remedy to paupers, and make it available to those able to pay. In this respect, it matters little whether the post-conviction method is termed civil or criminal. Consequently, the civil-criminal distinction discussed above has no bearing on the cases at bar.

It is, therefore, submitted that the states have a constitutional duty to provide a method by which denial of constitutional rights can be tested after conviction; these petitioners are not allowed to use the available state remedy because of their poverty. This is surely a denial of due process and equal protection of the laws.

6. Exhaustion of State remedies.

It may be argued that the petitioners have exhausted their state court remedies and are now entitled to proceed in the federal courts. *United States ex rel. Marcial* v. *Fay*, 247 F. 2d 662 (Second Circ. 1957). But as Judge Medina pointed out in the *Fay* case, *supra*,

> "The requirement of exhaustion exists because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation', Darr v. Burford, 339 U. S. 200." (247 F. 2d at 665.)

The petitioners at bar are unable to exhaust their state court remedies without payment of fees which they are unable to pay. Hence, although in one sense state court remedies are exhausted, the teaching of *Darr* v. *Burford*, *supra*, indicates that the better practice would be to have the state courts pass on the constitutional claims of petitioners before the federal courts are involved.

D. State Court Decisions Are Not Binding on Supreme Court of the United States When Provisions of the Federal Constitution Are Involved.

The Attorney General of the State of Iowa in his original brief in response to the petitions for certiorari argued that failure to comply with state procedure, including payment

of the filing fees required by the Iowa Code, was an adequate state ground for the Iowa Supreme Court decision. Of course, procedural laws of the State are controlling as long as they are constitutional under the State and Federal Constitutions. It begs the question, however, to say that Section 606.15 and Section 685.3 are laws of the state, hence must be followed by the United States Supreme Court. This might have been so before the 14th Amendment to the United States Constitution; but that amendment precludes such an argument when the constitutionality of the state procedural laws is drawn into question. *No State* shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The laws of the State of Iowa which the Attorney General has set up as a defense are exactly the laws which the petitioners in these cases challenge as being unconstitutional as applied to them under the facts of these cases. If the Attorney General's argument is correct, the Court would never have reached the decision it did in *Burns* v. *Ohio*, 360 U. S. 252, or *Griffin* v. *Illinois*, 351 U. S. 12.

E. The Petitioners Are Appealing From a Final Judgment of the Iowa Courts.

The applicable federal jurisdiction statute, 28 U. S. Code, Sec. 1257, provides that a petition for certiorari will be granted only in cases of a final judgment of the court of last resort of the State having jurisdiction. It is true, of course, that there are slight variations in the handling of these cases in the state courts.

In *Marshall* v. *Bennett*, No. 177, the District Court judge denied petitioner the right to file his petition for habeas corpus without payment of the requisite filing fee (MR 6). Subsequently the court issued another order in which it

stated that nothing had ever been filed in the District Court (MR 10). Petitioner moved in the Supreme Court of Iowa for an order for leave to proceed with the appellate litigation without the prepayment of any statutory costs or filing fees (MR 13), and supported this motion with an affidavit in which he stated under oath that he was "without funds or property of my own; nor money, nor means to obtain money with which to pay the statutory filing fee for docketing this appeal, and unless this attached motion is sustained I will be unable to obtain the relief to which I believe I am entitled by this appeal . . ." (MR 15). On October 20, 1959, the Supreme Court of Iowa issued an order reading simply: "Application denied" (MR 17).

In *Smith* v. *Bennett*, No. 174, the petitioner made a motion in the District Court, in connection with his attempt to file a petition for a writ of habeas corpus, in which he moved that the court allow said petition to be filed *in forma pauperis* (SR 5) and accompanied said motion with an affidavit stating that he "was without funds or property and without sufficient funds to pay the filing fee" (SR 6). The petition and motion were returned to him by the deputy clerk of the Lee County District Court with a letter stating that the petition would be presented to the judge if the $4.00 filing fee were sent (SR 7). Smith then moved for leave to appeal *in forma pauperis* in the Supreme Court of the State of Iowa (SR 8), and the Supreme Court of Iowa on the 15th day of December, 1959, entered an order denying the motion for leave to appeal the order of the Clerk of the District Court (SR 10). Thus, in both Marshall and Smith, the petitioners have been denied the right to have their petition for a writ of habeas corpus considered by the District Court because of their inability to pay the statutory filing fees required by Section 606.15, 1958 Code of Iowa. Both petitioners have likewise been denied the

right to proceed *in forma pauperis* with their appeal in the Supreme Court of the State of Iowa. Certainly, the orders of the Supreme Court of Iowa, more than the letter from the Clerk of the Ohio Supreme Court involved in *Burns* v. *Ohio*, 360 U. S. 252, are final judgments within the meaning of 28 U. S. C. 1257.

Thus, the doors of the courts of the State of Iowa have been effectively closed to these two indigent prisoners who, because of their poverty, are unable to pay the requisite filing fees. Until they pay the filing fees, the courts of Iowa will take no further action; since they are unable to pay the filing fees, they will have no other course open in the Iowa courts, unless this court holds unconstitutional Sections 606.15 and 685.3, 1958 Code of Iowa, as applied to habeas corpus proceedings.

Conclusion

The Fourteenth Amendment means that in criminal proceedings rich and poor are to be treated with an equal hand. Ability to have questions of freedom determined by State courts should not turn on the condition of a prisoner's pocketbook. Habeas corpus, although often called a civil action, is more than an ordinary civil action; it is a means designed to insure the liberty of the person, a bulwark of personal freedom. A prisoner should not be denied access to habeas corpus proceedings merely because he is without means; certainly the rich should not be allowed to file petitions for habeas corpus, while the poor are denied the right. Here, then, is the heart of these cases: can the State constitutionally close the doors of its courts to indigent prisoners seeking habeas corpus relief?

We urge this Court to hold Sections 606.15 and 685.3, 1958 Code of Iowa, unconstitutional as applied to habeas corpus proceedings, and to remand these cases to the Iowa courts so that these petitioners can at long last have their claims considered on the merits.

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FILE COPY

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 174

NEAL MERLE SMITH,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

Respondent.

No. 177

RICHARD W. MARSHALL,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT

EVAN HULTMAN
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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT

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Summary of Argument

In Iowa, paupers are allowed to appeal from criminal convictions without prior payment of filing fees (section 789.20, 1958 Code of Iowa), and free transcripts are provided by the county to be used in such appeals (section 793.8, 1958 Code of Iowa). Hence, indigent criminal defendants are not deprived of appellate review of the criminal proceedings by which they were convicted. The State of Iowa, therefore, conforms to the decisions rendered by this Court in *Burns v. Ohio*, 360 U. S. 252 and *Griffin v. Illinois*, 351 U. S. 12.

Habeas corpus is a civil action brought by a prisoner to obtain his personal liberty—not by the state to punish him for his crime. *Ex Parte Tom Tong*, 108 U. S. 556. It is a new suit begun by the prisoner and, by requiring a filing fee, the State of Iowa is not exacting a price which a defendant must pay to defend himself.

Many of our civil rights, including the right to personal liberty, are highly privileged in American law. The statutes of Iowa which require filing fees to be paid apply to all civil actions brought to enforce these rights. Respondent submits that if these statutes are unconstitutional as applied to one such right, then they must be unconstitutional as to all.

Respondent further submits that the convicted criminal's right to habeas corpus is a statutory right (section 663.5, 1958 Code of Iowa), and that the legislature of Iowa may extend or limit its application without depriving petitioners of constitutional rights.

Though indigent convicted criminals are unable to file a petition for habeas corpus in Iowa, they may proceed in the federal courts for the vindication of federal rights alleged to have been denied by the state. 28 U.S.C. § 2254

(Supp. 1950) provides that a habeas corpus action may be brought in the federal courts whenever circumstances exist which render state process "ineffective to protect the rights of the prisoner." The poverty of one seeking habeas corpus could be viewed by a federal court as such a circumstance.

Respondent urges, therefore, that this Court hold sections 606.15 and 685.3, 1958 Code of Iowa, constitutional as applied to habeas corpus proceedings.

Argument

A. Burns v. Ohio, 360 U.S. 252, and Griffin v. Illinois, 351 U.S. 12, Were Concerned With Direct Attacks Upon Criminal Convictions Through the Process of Criminal Appeals.

As stated by the petitioners, at page 9 of their brief, the question presented in *Burns v. Ohio*, 360 U. S. 252, was "whether a state may constitutionally require an indigent defendant in a *criminal* case to pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts." This Court held that the denial of the right of an indigent criminal defendant to appeal by the imposition of financial barriers was a denial of rights guaranteed by the 14th Amendment to the United States Constitution.

In *Griffin v. Illinois*, 351 U. S. 12, cited by the petitioners at page 11 of their brief, this Court held that the State of Illinois could not constitutionally refuse to provide a transcript to an indigent *criminal* defendant seeking to appeal because of his inability to pay for such transcript.

In Iowa, indigents may appeal from criminal convictions without prior payment of filing fees (section 789.20, 1958 Code of Iowa), and transcripts are provided by the county to be used in such appeals (section 793.8, 1958 Code of

Iowa). The State of Iowa, therefore, conforms to the decisions in the *Burns* and *Griffin* cases.

Obviously, these cases were concerned with the rights of a convicted criminal seeking to make a direct attack upon his conviction by appeal to a court of review. Such a direct attack can generally be made only once, and errors of the trial court are not subject to collateral attack. *Riddle v. Dyche*, 262 U. S. 333. These cases teach that to deny the right of appeal because of financial inability to pay costs in advance is to deny, to some, a most important portion of the criminal action against them. As an appeal is a part of the criminal proceeding itself, it is the denial of the full right of the accused to defend himself.

It is submitted that an entirely different question is presented by the case at bar.

B. The Rule of Burns v. Ohio, 360 U.S. 252, Should Not Be Extended to Habeas Corpus Proceedings.

1. Habeas Corpus is a Civil Action.

The classification of habeas corpus as a civil action is well settled by decisions of this Court and of the Supreme Court of Iowa. *Riddle v. Dyche*, 262 U. S. 333; *Cross v. Burke*, 146 U. S. 82; *Ex Parte Tom Tong*, 108 U. S. 556; *Orr v. Jackson*, 149 Iowa 641, 128 N. W. 958; *Stevenson v. Collins*, 54 Iowa 441, 6 N. W. 692.

This classification was not made arbitrarily or without due consideration. Nowhere has the definite distinction between habeas corpus and criminal prosecution been more clearly set forth than by the Supreme Court of the United States in *Ex Parte Tom Tong*, 108 U. S. at 559:

"Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes

are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under criminal process . . . the proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime."

The State of Iowa, in requiring a convicted criminal to pay a filing fee to petition for a writ of habeas corpus, is not exacting a price for the right of an accused to defend himself against a criminal prosecution. The State is now, in effect, the defendant in civil action brought by an individual for the purpose of enforcing a civil right. The petitioner has taken the affirmative. The burden is his. The action which he brings, like other civil actions, may be filed again and again whenever new grounds therefor are alleged to exist. In fact, it can be abused. See *Dorsey v. Gill*, 148 F. 2d 857; 862-64; *State v. Boy*, 102 A. 2d 684, 885 (N.J. 1954). Section 663.44, 1958 Code of Iowa, provides that the costs of a habeas corpus action shall be taxed to the defendant, "if the plaintiff is discharged." Why should the State be required to pay such costs without regard to the merits of the claim? Must the defendant financially aid the plaintiff to bring suit?

It should be noted, at this point, that the filing fees required to institute civil actions, including habeas corpus, in Iowa are extremely nominal in amount ($4.00—not $400.00), and the respondent submits that the difference matters a great deal. It is difficult to envision a situation where a prospective plaintiff could not meet this require-

ment. Even prisoners, in Iowa, are gainfully employed (section 246.18, 1958 Code of Iowa).

Respondent does not deny that the right to personal liberty is highly prized and protected by our society. Nor would he deny that our rights to freedom of worship, free press, free speech, and many others, are also highly prized and protected. These most fundamental rights are all civil in nature and civil actions may be brought to enforce them whenever they are threatened. The filing fees required by sections 606.15 and 685.3, 1958 Code of Iowa, are applicable to all such civil actions. If these statutes are unconstitutional as applied to the enforcement of one of these most basic liberties, then surely they must be unconstitutional as to all.

2. The "Right" of a Convicted Criminal to Habeas Corpus is Granted by Statute—Not by the Constitution.

Although the writ of habeas corpus has come to be used to the greatest extent by convicted criminals, this group was historically excepted from those who might make use of it. The Habeas Corpus Act of 1679, 31 Car. II, c. 2, required the lord chancellor and any of the judges of the superior courts to issue the writ in vacation in term, *unless* the prisoner was committed for treason or felony, *or was in prison on conviction for crime or in execution.* There is nothing in our Federal Constitution or the Constitution of Iowa which indicates that habeas corpus must be made available to convicted criminals. See Collings, *Habeas Corpus for Convicts —Constitutional Right or Legislative Grace?*, 40 Calif. Law Rev. 335 at 356-57, wherein Mr. Collings states:

> "What must not be forgotten is that all of this vastly expanded right of habeas corpus for convicts came not from the Constitution but from the Act of 1867; 'the recent decisions have not arisen out of the ancient tra-

dition nor do the causes from which they spring involve the traditional incidents of wrongful confinement.' . . . "

"The only constitutional basis for these decisions is that the 1867 Act specifically provides for relief where a person is restrained of liberty 'in violation of the Constitution.' And it is considered to be implicit in the due process clause that where a conviction is rendered in violation of a constitutional right a corrective process ought to be supplied, and will be supplied wherever possible. But there is nothing in any of those decisions which would require that Congress and the states supply a corrective process. And certainly nothing in any of the decisions would require that the corrective process be habeas corpus."

Article I, Sec. 9, of the Constitution of the United States and Article I, Sec. 13, of the Constitution of the State of Iowa do not specify those who are entitled to apply for the writ, nor do they prescribe rules governing the issuance thereof. In Iowa, these matters are governed by the provisions of Chapter 663, 1958 Code of Iowa. Filing fees required to be paid to bring this action are those required for the filing of actions in replevin, mandamus, quo warranto, partition, quieting title, and nearly every other type of civil proceeding.

It is clear that habeas corpus is a statutory civil remedy and it is urged by respondent that the writ should remain subject to the same statutory regulation as other civil remdies.

C. An Indigent Prisoner Seeking Habeas Corpus Has Recourse to the Federal Courts.

An imprisoned pauper, who seeks relief by habeas corpus, is not without recourse to vindicate the denial of a Federal

Constitutional right. As stated by this Court in *Ex Parte Hawk*, 321 U. S. 114 at page 118:

> ". . . where resort to state court remedies has failed to accord a full and fair adjudication of the Federal contention raised, either because the state affords no remedy . . ., or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. Moore v. Dempsey, 261 U. S. 86, Ex Parte Davis, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus."

See *White v. Ragen*, 324 U. S. 760, 764-65.

Habeas corpus may be brought *in forma pauperis* in the federal courts. 28 U. S. C. §§ 1915, 2250 (Supp. 1950).

Although one federal court has ruled that the inability to pay state filing fees in bringing a habeas corpus action did not exhaust available state remedies, *Willis v. Utecht*, 185 F. 2d 210 (8th Cir. 1950), cert. denied, 340 U. S. 915, other federal courts have taken a contrary view. *U. S. ex rel. Pugce v. Cummings*, 233 F. 2d 190 (2d Cir. 1956), cert. denied, 352 U. S. 854; *Robbins v. Green*, 218 F. 2d 192 (1st Cir. 1954); *Dolan v. Alvis*, 186 F. 2d 586 (6th Cir. 1951), cert. denied, 342 U. S. 906.

It is submitted that the federal Judicial Code provides an alternative to the exhaustion rule which may be exercised to protect the rights of the indigent prisoner. This alternative is set forth in 28 U.S.C. § 2254 (Supp. 1950), which codifies the exhaustion rule and provides, in part, as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*" (Emphasis added.)

In the case of an indigent who is unable to pay state filing fees, there would exist circumstances rendering the state process "ineffective to protect the rights of the prisoner." This Court made reference to this alternative in *Frisbie v. Collins*, 342 U. S. 519, at pages 520-21:

"There is no doubt that as a general rule federal courts should deny the writ to state prisoners if there is 'available state corrective process.' 62 Stat. 967, 28 U.S.C. § 2254. As explained in Darr v. Burford, 339 U. S. 200, 210, this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals."

See *Darr v. Burford*, 339 U. S. 200, 210.

Robbins v. Green, supra, at page 195, squarely held that a prisoner's inability to pay filing fees in the state court constituted a circumstance, "rendering such process ineffective to protect the rights of the prisoner."

Habeas Corpus is an available post-conviction civil remedy in the State of Iowa. It is conceded that one's inability to pay a nominal filing fee, to wit: $4.00, may render this

remedy ineffective to protect his rights, but it is submitted that he may then proceed in the federal courts to obtain vindication of any federal rights which may have been denied him.

Conclusion

As stated by petitioners at page 31 of their brief, "The Fourteenth Amendment means that in criminal proceedings rich and poor are to be treated with an equal hand." The Supreme Court of the United States and the Supreme Court of Iowa have determined that habeas corpus is a civil proceeding—not a criminal proceeding. Questions of our liberties have long been decided in civil actions brought to enforce them, and, in Iowa, one who institutes a civil action must pay a reasonable filing fee. To require the state to pay the filing fee of the plaintiff in a civil action would be to discriminate against those who can afford to pay, against the defendant, and against the State itself.

The State must provide a judicial system accompanied by the necessary administrative facilities required for its operation. Should not those who make use of our courts to enforce their fundamental civil liberties bear, at least, a nominal share of the burden?

It is submitted that the extension of the *Burns* rule to one of these basic liberties would require its extension to all. Even if its application were restricted to habeas corpus, the extension would include such obviously non-criminal matters as child custody and confinement for mental illness.

It is further submitted that such a holding would reverse a well-reasoned position of long standing taken by this Court—that habeas corpus is a civil action, and would, in effect, require every state to make the civil action of habeas corpus its criminal post-conviction remedy.

Respondent therefore urges that this Court uphold the constitutionality of sections 606.15 and 685.3, 1958 Code of Iowa, as applied to habeas corpus proceedings.

Evan Hultman
Attorney General of Iowa
Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

Nos. 174 AND 177.—OCTOBER TERM, 1960.

Neal Merle Smith, Petitioner, 174 v. John E. Bennett, Warden. Richard W. Marshall, Petitioner, 177 v. John E. Bennett, Warden.	On Writs of Certiorari to the Supreme Court of Iowa.

[April 17, 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue in these habeas corpus cases concerns the validity, under the Equal Protection Clause of the Fourteenth Amendment, of the requirement of Iowa law that necessitates the payment of statutory filing fees[1] by an indigent prisoner of the State before an application for a writ of habeas corpus or the allowance of an appeal in such proceedings will be docketed. As we noted in *Burns* v. *Ohio*, 360 U. S. 252, 256 (1959), "[t]he State's commendable frankness in [these] . . . case[s] has simplified the issues. In its brief, the State conceded that "indigent convicted criminals are unable to file a petition for habeas corpus in Iowa." We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.

[1] Iowa Code Ann. (Cum. Supp. 1960) § 606.15 provides in pertinent part that "[t]he clerk of the district court shall charge and collect . . . [f]or filing any petition . . . and docketing the same, four dollars." Section 685.3 states in relevant part that "[t]he clerk [of the Supreme Court] shall collect . . . [u]pon filing each appeal, three dollars."

In No. 174, *Neal Merle Smith* v. *John E. Bennett, Warden*, the petitioner was convicted and sentenced to serve 10 years in the state penitentiary for the offense of breaking and entering. In due course he was released on parole. After a short period, however, this was revoked for violation of its conditions. Petitioner was arrested and was thereafter returned to the penitentiary for completion of his sentence. He then forwarded to the Clerk of the District Court of Lee County, Iowa, a petition for a writ of habeas corpus with accompanying motion to proceed *in forma pauperis* and an affidavit of poverty. In the petition he raised constitutional questions as to the validity of the warrant of arrest under which he was taken into custody and returned to the penitentiary. The Clerk refused to docket the petition without payment of the $4 filing fee. Petitioner then filed a motion in the Iowa Supreme Court for leave to appeal *in forma pauperis*, together with a pauper's oath, which the court denied without opinion. On appeal to this Court, we dismissed the appeal but treated the papers as a petition for certiorari, which was granted, limited to the above question. 363 U. S. 834.

In No. 177, *Richard W. Marshall* v. *John E. Bennett, Warden*, the petitioner, who was represented by counsel, pleaded guilty to an information charging the offense of breaking and entering and was sentenced to 10 years' imprisonment at the Iowa State Penitentiary. A year later he forwarded to the Clerk of the District Court of Lee County, Iowa, a petition for a writ of habeas corpus alleging that he was detained "contrary to the provisions of the 14th Amendment, § 1" because the information to which he pleaded guilty was "fatal on its face" in that "it does not charge Petitioner with 'intent' " and further because his "plea thereon was obtained by coercion and duress." Accompanying the petition was a motion for leave to proceed *in forma pauperis* and a pauper's affi-

davit. Thereafter, in an unreported written order, the court refused to docket the petition without the payment of the statutory filing fee but, nevertheless, examined the petition and found it "would have to be denied if properly presented to the Court." Petitioner forwarded appeal papers to the Supreme Court of Iowa but that application was also denied. Petitioner's motion to proceed here *in forma pauperis* was granted, as was his petition for certiorari, which was limited to the question posed in the opening paragraph, *supra*. 363 U. S. 838.

In *Burns* v. *Ohio*, *supra*, we decided that a state could not "constitutionally require . . . an indigent defendant in a criminal case [to] pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts." At p. 253. That decision was predicated upon our earlier holding in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), that an indigent criminal defendant was entitled to a transcript of the record of his trial, or an adequate substitute therefor, where needed to effectively prosecute an appeal from his conviction. The gist of these cases is that because "[t]here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants," *Burns* v. *Ohio*, *supra*, at 257–258, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *Griffin* v. *Illinois*, *supra*, at 19, and consequently that "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Burns* v. *Ohio*, *supra*, at 258. Iowa had long anticipated the rule announced in these cases, *i. e.*, indigent defendants may appeal from criminal convictions without prior payment of filing fees, Iowa Code § 789.20 (enacted in 1917), and transcripts are provided by the county to be used in such appeals, Iowa Code § 792.8 (enacted in 1872). As

the State points out, those cases "were concerned with the rights of a convicted criminal seeking to make a direct attack upon his conviction by appeal . . . ." Habeas corpus, on the other hand, is not an attack on the conviction but on the validity of the detention and is, therefore, a collateral proceeding. The State, however, admits that the Great Writ "is an available post conviction civil remedy in . . . Iowa" and concedes that a prisoner's inability to pay the $4 fee would render it unavailable to him. The question is therefore clearly posed: Since Iowa does make the writ available to prisoners who have the $4 fee, may it constitutionally preclude its use by those who do not?

The State insists that it may do so for three reasons. First, habeas corpus is a civil action brought by a prisoner to obtain his personal liberty, a civil right, and if it must be made available to indigents free of fees in protection of that right then it must be made available in like manner to all indigents in the protection of every civil right. Second, habeas corpus is a statutory right, Iowa Code § 663.5, and the legislature may constitutionally extend or limit its application. Finally, a habeas corpus action may be brought in the United States District Court because Iowa's fee requirement fulfills the demand of 28 U. S. C. § 2254, that "the existence of circumstances rendering such [state corrective] process ineffective to protect the rights of the prisoner" be present.

While habeas corpus may, of course, be found to be a civil action for procedural purposes, *Ex parte Tom Tong*, 108 U. S. 556 (1883), it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. The State admits that each petitioner here is an indigent and that its requirement as to the $4 fee payment has effectively denied them the use of the writ. While

$4 is, as the State says, an "extremely nominal" sum, if one does not have it and is unable to get it the fee might as well be $400—which the State emphasizes it is not. In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is "the highest remedy in law for any man that is imprisoned." 3 Howell's State Trials 95 (1628). The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels. Ever since the Magna Charta, man's greatest right—personal liberty—has been guaranteed, and the procedures of the Habeas Corpus Act of 1679[2] gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its "privilege . . . shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9. Its principle is imbedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention. Over the centuries it has been the common law world's "freedom writ" by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired," *Bowen* v. *Johnston*, 306 U. S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State,

[2] 31 Car. II, c. 2.

financial hurdles must not be permitted to condition its exercise.

To require the State to docket applications for the post-conviction remedy of habeas corpus by indigent prisoners without the fee payment does not necessarily mean that all habeas corpus or other actions involving civil rights must be on the same footing. Only those involving indigent convicted prisoners are involved here and we pass only upon them.

The Attorney General of Iowa also argues that indigent prisoners in the State's custody may seek "vindication of federal rights alleged to have been denied by the state" in the federal courts. But even though this be true—an additional point not involved or passed upon here—it would ill-behoove this great State, whose devotion to the equality of rights is indelibly stamped upon its history, to say to its indigent prisoners seeking to redress what they believe to be the State's wrongs: "Go to the federal court." Moreover, the state remedy may offer review of questions not involving federal rights and therefore not raisable in federal habeas corpus.

Because Iowa has established such a procedure, we need consider neither the issue raised by petitioners that the State is constitutionally required to offer some type of post-conviction remedy for the vindication of federal rights, nor the State's converse claim that the remedy is a matter of legislative grace. However, the operation of the statutes under attack has, perhaps inadvertently, made it available only to those persons who can pay the necessary filing fees. This is what it cannot do.

Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained. Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal

scale, and its hand extends as far to each. In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws. The judgments of the Supreme Court of Iowa are vacated and each cause is remanded to that court for further action consistent with this opinion.

Vacated and remanded.